

## Joceline Tan Poh Choo & Ors v V Muthusamy

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-854  
OF 2000

MOKHTAR SIDIN, ARIFIN ZAKARIA AND RAHMAH HUSSAIN JJCA

1 AUGUST 2003

**Civil Procedure** — *Damages — Assessment of damages — Interest — Interest in defamation cases — No claim for interest on damage sought made in the writ of summons or statement of claim — No omnibus prayer in writ of claim seeking further or other relief — Whether court could in its discretion award interest on damages*

**Tort** — *Defamation — Libel — Court proceedings — Publication of report of proceedings in court — Whether defamatory of plaintiff — Plaintiff a lawyer and member of state legislative assembly — Quantum of damages to be awarded*

**Tort** — *Defamation — Libel — Damages — Aggravated Damages — Failure to publish apology or retraction — Defence of absolute privilege — Apology or retraction would not be appropriate — Whether sufficient grounds for award of aggravated damages*

**Tort** — *Defamation — Libel — Damages — Publication of report of proceedings in court — Plaintiff a lawyer and member of state legislative assembly — Whether quantum of damages awarded excessive*

**Tort** — *Defamation — Libel — Defences — Absolute privilege — Publication of report of proceedings in court — Whether defence limited to report of proceedings in open court only — Whether defence applicable to report of statement in pleadings — Whether report of plaintiff's pleadings a fair and accurate report of the proceedings*

**Tort** — *Defamation — Libel in newspaper — Court proceedings — Publication of report of proceedings in court — Whether defamatory of plaintiff — Quantum of damages to be awarded*

The defendants published an article reporting the suit of a driver who claimed to have been cheated of certain property as the result of an alleged conspiracy between a lawyer and another person. It was not in dispute that the 'lawyer' in the report referred to the plaintiff, a practicing lawyer and a state assemblyman. Accompanying the report was a photograph of the plaintiff. The plaintiff brought an action claiming, *inter alia*, damages for libel against the author, the editor and the proprietor and publisher of the publication. The defendants relied on the defence of absolute privilege. The trial judge found that the defendants liable for libel and awarded RM300,000 in general damages, a further RM50,000 as aggravated damages, interest on the awards at 8% pa from the date of judgment and costs. The defendants appealed against the findings on liability and quantum. The plaintiff cross-appealed on the quantum and for interest on the awards to run from the date of the publication.

**A Held:**

- B** (1) The first pertinent issue for determination was whether the report was defamatory of the plaintiff. Any reasonable person reading the report would form the opinion that the plaintiff was a cheat and a dishonest person, not fit to practise law or to hold public office. The finding of the trial judge that the report was defamatory of the plaintiff was thus upheld (see pp 500D, 501B); *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 referred.
- C** (2) The critical issue here was whether the report was a fair and accurate report of the proceedings that had taken place in the open court. In order to be so regarded, the report should be confined to what was publicly heard in open court and not to matters contained in documents filed in court. Privilege will not attach to the publication of the contents of pleadings, affidavits or other papers which, although filed in civil proceedings, are not brought up in open court (see p 502C–D); *McCarey v Associated Newspapers Ltd & Ors* [1964] 1 WLR 855 distinguished and *Stern v Piper* [1996] 2 All ER 385 referred.
- D** (3) In the present case defendants admitted that the article was based in part on the evidence given in open court, as well as on the statement of claim. The trial judge found that the report was primarily based on the statement of claim rather than on what had taken place in the open court. The publication of parts of the amended statement of claim, not having been read out in open court, was not within the scope of the protection given by the defence of absolute privilege (see p 503E, 504B, D).
- E**
- F** (4) The libel was contained in a newspaper article related to an on-going civil suit. The report merely contained allegations made by the driver against the lawyer. Such allegations were not uncommon in a court of law. The defendants were not free from blame but it is a question of degree. Judged in that light, and in the current trend of award of damages for libel in this country, the award by the trial judge was grossly excessive. The award of general damages was reduced from RM300,000 to RM100,000 (see p 506H–507A).
- G**
- H** (5) Whether a defendant's failure or refusal to retract or to make a satisfactory correction of an report would render a defendant liable to aggravated damages depends on the facts and circumstances of a given case. Here, the want of apology could not, without more, have aggravated the plaintiff's injury. The appellants had relied wholly on the statutory defence of absolute privilege, where an apology or retraction would not be appropriate. There was no evidence that the defendant's conduct had been motivated by malice. The award of aggravated damages was thus wholly unwarranted and was set aside (see p 507H, 508B–C).
- I**

- (6) The award of interest should run from the date of publication of the reports (see p 508E-F); *Karpal Singh a/l Ram Singh v DP Vijandran* [2003] 2 MLJ 385 followed.

### [Bahasa Malaysia Summary]

Defendan telah melaporkan tindakan yang difailkan oleh seorang pemandu yang mendakwa telah ditipu hartanahnya akibat suatu komplot antara seorang peguam dan seorang lagi. Adalah tidak dinafikan bahawa 'peguam' dalam laporan tersebut merujuk kepada plaintiff, seorang peguambela bertaualiah yang juga ahli dewan undangan negeri. Laporan tersebut diiringi suatu gambar plaintiff. Plaintiff membawa tindakan menuntut, antara lain, ganti rugi bagi finath dari pengarang, penyunting serta tuanpunya dan penerbit akhbar tersebut. Defendan bergantung kepada pembelaan hak istimewa mutlak. Hakim perbicaraan mendapati defendan bertanggungjawab bagi fitnah tersebut dan memberikan award RM300,000 sebagai ganti rugi am, RM50,000 selanjutnya bagi ganti rugi peruncingan, faedah ke atas award pada kadar 8% setahun dari tarikh penghakiman dan kos. Defendan merayu ke atas pendapatan mengenai liabiliti dan kuantum. Plaintiff juga telah merayu balas ke atas kuantum dan memohon faedah dikira dari tarikh penerbitan laporan tersebut.

### Diputuskan:

- (1) Isu relevan pertama yang perlu dikenalpasti sama ada laporan tersebut memfitnahkan plaintiff. Seorang yang munasabah yang membaca laporan tersebut pasti berpendapat bahawa plaintiff seorang penipu dan tidak jujur, tidak layak mengamal undang-undang atau memegang jawatan awam. Pendapat hakim perbicaraan bahawa laporan tersebut telah memfitnahkan plaintiff dikekalkan (lihat ms 500D, 501B); *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 dirujuk.
- (2) Isu penting di sini sama ada laporan tersebut suatu laporan adil dan tepat persidangan yang diadakan dalam mahkamah terbuka. Bagi menepati kehendak ini, laporan tersebut harus dihadkan kepada apa yang telah dibentangkan dalam mahkamah terbuka dan bukannya kepada perkara yang terkandung dalam dokumen yang difailkan dalam mahkamah. Hak istimewa tidak wujud kepada penerbitan kandungan sebarang pliding, affidavit atau dokumen lain yang, walaupun telah difailkan di mahkamah, tidak dibentangkan dalam mahkamah terbuka (lihat ms 502C-D); *McCarey v Associated Newspaper* [1964] 1 WLR 855 dibeza dan *Stern v Piper* [1996] 2 All ER 385 dirujuk.
- (3) Dalam kes ini defendan mengaku laporan tersebut berasaskan dari keterangan yang diberikan dalam mahkamah terbuka,

- A mahupun dari pernyataan tuntutan. Hakim perbicaraan mendapati laporan tersebut terutamanya berasaskan pernyataan tuntutan dan bukannya pada persidangan mahkamah terbuka. Penerbitan sebahagian pernyataan tuntutan, yang tidak dibentangkan dalam mahkamah terbuka, bukannya dalam skop perlindungan yang diberikan oleh pembelaan hak istimewa mutlak (lihat ms 503E, 504B,D).
- B
- C (4) Fitnah yang terkandung dalam laporan tersebut berkaitan suatu tuntutan sivil yang berterusan. Laporan tersebut hanya mengandungi dakwaan yang dibuat pemandu tersebut terhadap peguam tersebut. Dakwaan sebegitu lazimnya dibuat dalam mahkamah undang-undang. Walaupun defendan bersalah, ia persoalan setakat mana ia bersalah. Jika dilihat sebegini, dan aliran award-award ganti rugi dalam kes fitnah dalam negeri, award hakim perbicaraan jelas keterlaluan. Award bagi ganti rugi am dikurangkan dari RM300,000 kepada RM100,000 (lihat ms 506H–507A).
- D (5) Sama ada kegagalan atau keengganan seseorang defendan menarik balik atau membetulkan sesuatu laporan menjadikannya bertanggungjawab terhadap ganti rugi teruk tertakluk kepada fakta dan keadaan sesuatu kes. Di sini, ketiadaan pembetulan laporan tersebut tidak, tanpa keterangan lain, menjejaskan kedudukan plaintif. Defendan berpegang kepada pembelaan statutori hak istimewa mutlak, di mana sesuatu pembetulan atau penarikan balik tidak memadai. Tiada sebarang keterangan menunjukkan bahawa defendan berniat jahat terhadap plaintif. Award ganti rugi teruk tidak wajar dan diketepikan (lihat ms 507H, 508B–C).
- E
- F (6) Faedah yang ditawarkan harus dikira dari tarikh penerbitan laporan tersebut (lihat ms 508E–F); *Karpal Singh all Ram Singh v D P Vijandran* [2003] 2 MLJ 385 diikut.]

### Notes

- G For cases on assessment of damages, see 2(2) *Mallal's Digest* (4<sup>th</sup> Ed, 2001 Reissue) paras 1919–1927.
- For cases on libel, see 12 *Mallal's Digest* (4<sup>th</sup> Ed, 2002 Reissue) paras 314–434.
- H For cases on libel in newspaper, see 12 *Mallal's Digest* (4<sup>th</sup> Ed, 2002 Reissue) para 440.

### Cases referred to

- I *Capital and Countries Bank v Henty* (1882) 7 App Cas 741 (refd)  
*Carson v John Fairfax & Sons Ltd* (1993) 113 AL 577 (refd)  
*Hill v Church of Scientology of Toronto* (1995) 2 SCR 1130 (refd)  
*Jones v Skeiton* [1963] 3 All ER 952 (refd)

- Karpal Singh all Ram Singh v DP Vijandran* [2001] 4 MLJ 161 (refd) **A**  
*Karpal Singh all Ram Singh v DP Vijandran* [2003] 2 MLJ 385 (folld)  
*Liew Yew Tiam & Ors v Cheah Cheng Hoe & Ors* [2001] 2 CLJ 385 (refd)  
*Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato' Vincent Tan Chee Yioun* [2000] 4 MLJ 77 (refd)  
*Mc Carey v. Associated Newspaper* [1964] 1 WLR 855 (distd) **B**  
*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 (refd)  
*Praed v Graham* (1889) 24 QBD 53 (refd)  
*Stern v Piper* [1996] 2 All ER 385 (refd)  
*Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 (refd) **C**

### Legislation referred to

Defamation Act 1957 s 11(1)

Law of Libel Amendment Act 1888 [Eng]

**D**

**Appeal from:** Suit No 22-147 of 1992 (High Court, Pulau Pinang)

*JA Yeoh (Shearn Delamore & Co)* for the appellant.

*Dato' V Muthusamy (C Prabhakaran with him) (V Muthusamy & Tan)* for the respondent.

**E**

**Arifin Zakaria JCA** (delivering judgment of the court):

### *The background facts*

This claim by the respondent arose out of a newspaper report in the *New Straits Times* of 12 September 1991 under the caption 'Lawyer and trader conspired to cheat me, claims driver'. Accompanying the report is a photograph of the respondent. The complaints by the respondent are against the caption, the first five paragraphs in the first column of the report ('the impugned report') and the photograph accompanying the report. The impugned report reads as follows:

**F**

**G**

Penang Wed — A lawyer allegedly conspired to cheat an illiterate man who had engaged him to facilitate the purchase of a property in Kulim, Kedah, the High Court was told today. Driver G Paramasivam claimed that the lawyer N. Muthusamy had breached their contract by allowing the land worth 376,900 to be transferred to a businessman nine years ago without his knowledge or permission. He said that when he demanded an explanation from Mr Muthusamy, the driver claimed he did not know anything and asked him to leave his office. He has named in his suit businessman Varlivell alias V Vadiveloo as the first defendant and Mr Muthusamy as the second defendant. He claimed he was cheated of the property as the result of the conspiracy between the two defendants and is seeking an order for the return of his property damages and costs.

**H**

**I**

It is not in dispute that the word 'lawyer' in the said report refers to the respondent.

**A** The respondent brought this action against the first appellant as the author of the report, the second appellant as the editor and the third appellant as the proprietor and publisher of the newspaper. The respondent claims compensatory and exemplary damages and an injunction to restrain the appellants from further printing, circulating, distributing or otherwise publishing the said or similar report.

**B**  
*On liability*

**C** In the amended statement of defence filed herein, the appellants raised the defence of absolute privilege under s 11(1) of the Defamation Act 1957 ('the Act'). The particulars of facts in the statement of defence reads as follows:

Butir-butir fakta.

- D** (i) melalui satu guaman sivil di Mahkamah Tinggi Pulau Pinang No 164 tahun 1984 seorang yang bernama Paramasivam a/l Govindaraji telah mengambil tindakan undang-undang terhadap seorang defendan bernama Varlivell @ Vadiveloo a/l Varatharajoo dan plaintiff telah dinamakan sebagai defendan kedua; dan
- E** (ii) dalam guaman sivil tersebut Paramasivam a/l Govindaraji tersebut, plaintiff yang dinamakan di dalamnya, telah, di dalam pernyataan tuntutan terpinda beliau bertarikh 24 April 1984 mengatakan, antara lainya, bahawa plaintiff telah secara fraud dan melalui salah nyata mendorong Paramasivam a/l Govindaraji tersebut untuk menandatangani surat bertarikh 12 November 1982 tanpa menjelaskan kandungan di dalamnya dan telah bermuafakat untuk mengambil hakmilik benefisial Paramasivam a/l Govindaraji tersebut terhadap harta dalam pelanggaran kontrak dan bercanggah dengan etiket dan etika professional plaintiff (selepas ini dirujuk sebagai 'pengataan tersebut');
- F** (iii) defendan-defendan menegaskan bahawa pengataan tersebut telah dirujuk beberapa kali oleh Yang Arif hakim perbicaraan dan juga oleh peguam bagi Paramasivam a/l Govindaraji tersebut sewaktu presiding yang didengar secara awam tersebut;
- G** (iv) defendan-defendan menegaskan bahawa perkataan yang terdapat di dalara rencana tersebut selain daripada pengataan tersebut adalah merupakan keterangan Paramasivam a/l Govindaraji tersebut yang diberikan di dalam presiding di hadapan Yang Arif hakim perbicaraan dan juga telah direkodkan oleh Yang Arif hakim perbicaraan di dalam nota keterangan yang rasmi.

**H** The appellants further deny that the respondent's photograph was published with malicious intention in order to damage the respondent's reputation both as a lawyer and a politician. The appellants contend that the said photograph was published in the context of the report since the respondent is a well known figure both in the legal circle as well as in political arena.

**I** The learned judge having heard the parties and submissions of counsel came to the finding that the appellants failed to prove that the report was a fair and accurate and a contemporaneous report of the proceedings publicly heard before a court. He then awarded the sum of RM300,000 as general damages and the sum of RM50,000 being aggravated damages plus interest thereon at 8%pa from the date of judgment and costs. The appellants now

appeal against the findings of the learned judge both as regard liability and quantum. The respondent cross appeals on the quantum.

A

It should be stated at the outset that the report relates to the proceedings in the Penang High Court in Civil Suit No 25-164-84 ('the said action'). In the said action, the respondent herein and one Varlivell @ Vadiveloo a/l Varatharajoo were sued by his former client by the name of Paramasivam a/l Govindaraji. The said action concerns the transfer of a piece of of land in Kulim Kedah.

B

The report relates to the proceedings of 11 September 1991, the first day of the hearing of the said action before his Lordship Mohamed Dzaiddin J (as he then was).

C

The first pertinent issue for determination is whether the said report is defamatory of the respondent. What is the proper test to be applied in determining the said issue. In *Jones v Skeiton* [1963] 3 All ER 952, Lord Morris referring to Lord Selborne in *Capital and Countries Bank v Henty* (1882) 7 App Cas 741 stated the test in the following terms:

D

It is well settled that the question whether words which are complained of are capable of conveying a defamatory meaning is a question of law and is therefore one calling for decision by the court, If the words are so capable then it is a question for the jury to decide whether the words do in fact convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. In *Capital and Countries Bank v Henty*, Lord Selborne said:

E

'The test according to the authorities, is, whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libelous sense.'

F

Mohamed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56 at p 58 put the test in the following words:

G

Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

H

In the present case, the respondent is a lawyer by profession and also a politician. At the material time, he was not only practising as a lawyer but he was also a state assemblyman for the constituency of Prai, in the State of Penang. He was also a member of the Penang Port Commission and a Notary public. Applying the test propounded in the abovesited cases, we are of the view that the allegation as contained in the impugned report alleging that the respondent had conspired to cheat an illiterate man in a land deal is clearly defamatory of the respondent. In our view, any reasonable person

I

**A** reading the relevant report would have formed an opinion that the respondent is a cheat and dishonest person and as such he is not fit to practise law and to hold public office. In the light of what we have just said, we therefore agree with the finding of the learned judge that the impugned report was defamatory of the respondent. Next, we shall consider the defence raised by the appellant.

**B**

*Defence under s 11(1) of the Defamation Act 1957*

In the amended defence the appellants raised the statutory defence of absolute privilege as provided in s 11(1) of the Act which reads as follows:

**C** A fair and accurate and contemporaneous report of proceedings publicly heard before any court lawfully exercising judicial authority within Malaysia and of the judgment, sentence or finding of any such court shall be absolutely privileged, and any fair and bona fide comment thereon shall be protected, although such judgment, sentence or finding be subsequently reversed, quashed or varied, unless at the time of the publication of such report or

**D** comment the defendant who claims the protection afforded by this section knew or ought to have known of such reversal, quashing or variation.

It is settled law that if the impugned report comes within the ambit of s 11(1) of the Act that will offer a complete defence to a claim for defamation. The rationale for this may be found in the judgment of Thompson J in *Mc Carey v. Associated Newspaper* [1964] 1 WLR 855 at p 856 where he said:

**E**

In regard to judicial proceedings the law regards it as important that what goes on in a public court should be known and should be fairly and accurately and contemporaneously reported. ... In the case, however, if a newspaper which is making a contemporaneous report of what has happened in judicial proceedings, so long as the newspaper fairly and accurately reports what happens, it is immune from liability.

**F**

Therefore, the critical issue here is, whether the impugned report was a fair and accurate and contemporaneous report of the proceedings that had taken place in the open court on 11 September 1991. Firstly, can the report

**G** be considered as contemporaneous? *Gatley on Libel and Slander* (9<sup>th</sup> Ed) para 13.32 discussed the meaning of 'contemporaneously' as used in the Law of Libel Amendment Act 1888. It says as follows:

Meaning of 'contemporaneously'. There is no English decision as to the meaning of the word 'contemporaneously' in the 1888 Act. It is submitted that the word means 'as nearly at the same time as the proceedings as is reasonably possible, having regard to the opportunities for preparation of the report and the time of going to press or of making the broadcast'. If this submission be correct, a report published in the next edition of a daily paper, or in the issues from day to day, if the proceedings were extended, would be 'contemporaneous'; so, too, perhaps would be a report in the next issue of a fortnightly paper, even though published 10 or 12 days after the proceedings. But if a daily paper delayed in report for 10 or 12 days, the report could clearly not be said to have been 'published contemporaneously' with the proceedings.

**H**

**I**

We would adopt the meaning of ‘contemporaneously’ as stated above. Since the report in the present case was published on 12 September 1991 purportedly of the proceedings of 11 September 1991, therefore, the report would certainly pass the test of contemporaneity as explained above.

The next issue is whether the impugned report could be regarded as a fair and accurate report of proceedings publicly heard before a court. The point in contention here is whether the report should only be confined to what was publicly heard in open court and not to matters contained in documents filed in court, and not read in open court. The learned counsel for the respondent contends that privilege will not attach to the publication in a newspaper of contents of pleadings, affidavits or other papers filed in civil proceedings and not brought up in open court. The underlying reason for this may be found in para 13.44 of *Gatley on Libel and Slander* (9<sup>th</sup> Ed) which reads:

It would be carrying privilege further than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation would be laid for scattering any libel broadcast with impunity.

In this regard we would also refer to the statement of Hirst LJ in *Stern v Piper* [1996] 2 All ER 385 at pp 394–395 which reads:

However, I think it is significant that privilege only protects reports of proceedings taking place in open court, and that its foundation is that those proceedings took place in public so that the public in general should have access to fair and accurate reports thereof (see *Webb v Times Publishing Co Ltd* [1960] 2 All ER 789, [1960] 2 QB 535). This is a consideration of public policy, and does not extend to court documents which have not been brought into the public arena.

In the chapter on qualified privilege in the section entitled ‘Judicial Proceedings’, under the heading ‘Publication of contents of documents not brought up in open court’, Gatley quotes a statement by Holmes J in *Cowley v Pulsifer* (1884) 137 Mass 392 at p 394:

‘It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing a statement of claim in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity.’ (see *Gatley* (8<sup>th</sup> Ed) para 624.)

This statement was made in the context of common law privilege, but I think it is nonetheless pertinent, and, that, if reports of affidavits, or other court documents, not produced in open court, were to have the protection of privileges extended to them, it could only be done by statute. I do not for one moment suggest that such an extension would be either practicable or desirable, since it would be very difficult to frame a rule which was just to all parties involved, but in the unlikely event of such a reform being attempted, it is unthinkable that considerations of accuracy and fairness would not require both sides’ allegations to be reported, and not, as here, only one side’s.

**A** It is indeed the one sidedness of the present publication which to my mind vindicates the justice of applying the repetition rule to the present case, avoiding the unfairness similar to that identified by Lord Denning in the *Truth* (NZ) case of a private court document emanating from one side being disseminated on a very wide scale to the public at large.

**B** On the other hand, I do not think that this decision will have the dire effect on the freedom of the press which Mr Eady predicts. The media will be free to report the issue of proceedings in both civil and criminal cases, and will have the full protection of privilege, (whether absolute or qualified according to the circumstances) for fair and accurate reports of all proceedings of either kind in open court. This, to my mind, furnishes ample scope for keeping the public properly informed.

**C** In the present case, the respondent contends that neither the witness G Paramasivam nor the learned trial judge or learned counsel in the said action made the defamatory statements as contained in the impugned report. The first appellant in her evidence frankly admitted that 'the article was based on evidence given in open court as well as the statement of claim'.  
**D** Mr Karpal Singh, the counsel for the plaintiff in the said action was called by the appellants. In his evidence Mr Karpal Singh stated, inter alia:

The statement as reported in second and fifth paragraphs in the first column of Bundle C p 1 reflects my client's claim as set out in the ASC (amended statement of claim).

**E** The said statement could have been said by me during the course of opening address perhaps adverting to the issues before my client took the stand.

From my experience some judges record in detail what transpired during the trial and some judges do not.

**F** This brings us to the question whether or not there was an opening speech by Mr Karpal Singh. The respondent and Mr Yap Chin Guan (SP2) denied that there was an opening speech by Mr Karpal Singh. The learned trial judge after having considered the evidence before him came to the finding that the learned counsel did not make an opening speech. He gave his reasons for his finding, which are briefly as follows. Firstly because SD1, the appellant herself in the report did not say that there was an opening speech by Mr Karpal Singh. Secondly SD4, Mr Karpal Singh, himself was not sure whether he did make such a speech. Thirdly, the note of proceedings of the court did not indicate that Mr Karpal Singh did make such a speech.  
**G** Having considered the matter we are of the view that there is no valid reason for us to disturb the above finding of the learned judge.  
**H**

Based on the above, it is clear that the statement as contained in the impugned report could only have been derived from the amended statement of claim filed in the court which was admittedly made available to the first appellant by Mr Karpal Singh. Paragraphs 12 and 13 of the amended statement of claim in the said action indeed contain allegation that the respondent herein conspired with the second defendant in the said action to defraud the plaintiff in the said action.  
**I**

Based on the above, the learned trial judge then came to his finding that the impugned report was primarily based on the amended statement of claim rather than on what had taken place in the open court. This is a finding of facts by the learned judge. We find that the finding of the learned judge is far from being perverted, on the contrary we think it is fully supported by the evidence before him.

The next issue is whether the appellants are entitled, in the circumstances, to rely on the statutory defence of absolute privilege under s 11(1) of the Act. We have no hesitation to say that our answer is in the negative. For support, we would rely on para 13.44, *Gatley on Libel and Slander* (9<sup>th</sup> Ed) and the observation of Hirst LJ in *Stern v Piper* cited above. Having said that we would conclude by saying that the publication by the appellants of part of the amended statement of claim which has not been read out in open court is not within the scope of the protection given by s 11(1) of the Act.

For the above reasons, we affirm the finding of the learned trial judge with regard to liability.

*The award of general and aggravated damages*

The learned trial judge made the following awards of damages:

- (i) the sum of RM300,000 as general damages; and
- (ii) the sum of RM50,000 as aggravated damages.

The appellants appeal against the said awards and the respondent cross-appeal on the award of general damages.

Firstly on general damages. The appellants contend that the award is excessive in the light of the recent decisions of this court. The appellants referred us firstly to the case of *Karpal Singh all Ram Singh v DP Vijandran* [2001] 4 MLJ 161. In that case, the appellant was sued for defamation arising from a press statement made by the appellant concerning the respondent. The High Court found for the respondent and awarded a sum of RM300,000 as damages taking into consideration the position and standing of the respondent as a politician, a former deputy speaker for Dewan Rakyat, a member of Parliament and a lawyer. The appeal to this court was dismissed with regard to liability but was allowed on quantum. Abdul Hamid Mohamad JCA delivered the judgment of the court. After considering a long line of authorities on the issue of quantum he said at p 186:

I may have missed out some cases but I think that the cases that I have referred are sufficient to show the trend. Until the arrival of *Tan Sri Vincent Tan Chee Yioun v Haji Hassan bin Hamzah & Ors* [1995] 1 MLJ 39 in 1995, the highest award ever given by the court in this country was RM100,000. *Vincent Tan* sky rocketed the awards. When the award was confirmed by the Court of Appeal, what was an isolated pinnacle in an otherwise undulating plain, the trend is set. When the Federal Court confirmed it, it became a

- A** binding precedent in all the courts in this country. But, now the Court of Appeal in *Liew Yew Tiam & Ors v Cheah Cheng Hoe & Ors* [2001] 2 CLJ 385 has had second thoughts about it. The learned judge of the Court of Appeal who wrote the main judgment in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 has sought to distinguish *MGG Pilla's* case. 'It is a decision that has been much misunderstood and the trend should be checked', he said.
- B**

This court is bound by the decisions of the Federal Court. But what is binding is the principle laid down by the Federal Court in assessing damages in libel cases, not the amount. The amount to be awarded in each case depends on the facts and the circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective. No scale can be fixed. But it does not mean that, given a set of facts, the appellate court cannot say confidently that an award is too little or too much or reasonable. It is the same as in an appeal against sentence in a criminal case or an appeal against an award of damages in other civil cases.

- C**
- D** The principle that this court should apply is clear whether this court is of the view that the trial judge had 'acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of damage suffered'. (See *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato' Vincent Tan Chee Yioun* [2000] 4 MLJ 77 and the cases referred to therein.)

- E** I would not say that the learned judge had acted on wrong principle in this case. However, I am of the view the learned judge has misapprehended the facts and was also influenced by the prevailing trend then.

- F** The second case referred to us is *Liew Yew Tiam & Ors v Cheah Cheng Hoe & Ors* [2001] 2 CLJ 385 which is also the decision of this court. In that case Gopal Sri Ram JCA who wrote the leading judgment in *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493, indeed warned against using that case as an unsurmountable hurdle of binding precedent in future cases. At p 395, he wrote:

- G** For, at the end of the day, the Federal Court affirmed the award made in the circumstances of that particular case as a proper exercise of judicial discretion by the Higher Court upon the question of damages. We do not think that it automatically follows as a matter of policy that the plaintiff in any case should be entitled to receive an award in millions of ringgit.

- H** The role of appellate court in the assessment of damages is plain from the authorities cited to us. An appellate court is not entitled to substitute its own judgment merely because it would have arrived at a different figure. It has been stated time and again that unless the verdict is so outrageously exorbitant, or shockingly excessive in relation to the libel, or manifestly unreasonable, unjust or irrational, the appellate courts should proceed with caution before making any variation in assessment of damages in libel case (see *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato' Vincent Tan Chee Yioun* [2000] 4 MLJ 77).
- I**

In addressing the issue of damages, the learned judge stated as follows:

Mengenai ganti rugi pada pendapat saya apa yang diberi lebih pada memadai. Saya dapati tiada justifikasi untuk Mahkamah memberi lebih dan itu. Ia berdasarkan prinsip yang dibentang dalam kes *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493. Keterangan yang diben oleh plaintiff tidak 'justify' yang beliau mengalarm kemgian sehingga RM1j. Keterangan plaintiff tidak mencukupi bagi menunuj ulkan dia mengalami kerugian sedemikian seperti kerugian legal practice daripada tahun 1991 hingga 1997 sebanyak RM706,025.87.

Tiada bukti bahawa beliau tidak dilantlk untuk jadi calon kerana tersiamya laporan C1. Adalah biasa bagi ahli politik digugurkan atas sebab-sebab di luar dugaan dan tiada bukti Presiden MIC tidak lantik plaintiff bertanding oleh kerana laporan C1. Bagaimana plaintiff boleh anggap beliau akan dilantlk jadi Ahli Exco jika menang pilihanraya. Itu hanya ramalan plaintiff sahaja. Adakah digerenti plaintiff boleh menang pilihanraya. Pada hemat saya gantirugi yang diberi agak tinggi bila mengambilkira keterangan yang 'credible'. Saya ambil kira kedudukan plaintiff secara keseluruhan.

We have scrutinized the evidence before the court and we came to a firm finding that the learned judge was clearly justified in coming to his finding that the respondent failed to adduce sufficient evidence to support his claim of RM1m as general damages. We further agree with the learned judge that there is no credible evidence to support the respondent's claim that he was not renominated as a candidate for the next general election because of the impugned report. As the learned judge correctly observed, a politician may be dropped as a candidate for a variety of factors and barring clear evidence showing that the respondent was dropped due to the impugned report one can only speculate as to the real reason or reasons that had prompted the respondent being dropped as a candidate for his party. However, in his judgment, particularly the part cited above, the learned judge did say that the amount of award made by him may be on the high side considering all the credible evidence before him. In this regard, we are of the view that the observation of this court in *Karpal Singh all Ram Singh v DP Vijandran* cited above is highly pertinent.

In this case, the claim arose out of an article in a newspaper which is related to an on going civil suit in the High Court at Penang. After carefully reading, the impugned report we are of the view that it merely contains allegations made by the plaintiff in the said action against the respondent herein. Such allegations are not uncommon in the court of law. No doubt the appellants are not free from blame. It is more a question of degree. Judging in that light and the current trend in the award of damages for libel cases in this country, we are of the view that the award by the learned judge in the present case is grossly excessive. In the circumstances, we would reduce the award of general damages from RM300,000 to that of RM100,000.

In regard to aggravated damages, the learned judge stated thus:

- A** Aggravated damages RM50,000 diberi sebagai tambahan kepada compensatory damages oleh kerana defendan-defendan berdegil tidak mengambil apa-apa langkah seperti memohon maaf dan sebagainya (sila lihat *Sandison v Malayan Times Ltd & Ors* [1964] MLJ 372; *Rajagopal v Rajan* [1972] 1 MLJ 45).
- B** The learned counsel for the appellants contends that the learned judge had fallen into error in making the award of aggravated damages on the basis of the appellants' failure to tender an apology for the publication. He submitted that in the law of libel the absence of apology does not fall within the circumstances which justify an award of exemplary or aggravated damages. The circumstances in which such damages may be awarded he contends are rather circumscribed.
- C**

The circumstances in which aggravated or punitive damages may be awarded in addition to the compensatory general damages are clearly set out by the Supreme Court of Canada in *Hill v Church of Scientology of Toronto* (1995) 2 SCR 1130 which was cited with approval by this court in *Liew Yew Tiam & Ors v Cheah Cheng Hoe & Ors*. In that case, Cory J in delivering judgment of the court stated:

- D**
- E** Aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high handed or oppressive, thereby increasing the plaintiffs humiliation and anxiety arising from the libellous statement. If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff either by spreading further a field the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff.
- F** If settled law that aggravated damages cover a broad ambit, the court is entitled to look at the conduct of the defendant from the time the libel was published down to the time a verdict is reached by the jury or a decision made by the court (see *Praed v Graham* (1889) 24 QBD 53. In this case the complaint by the respondent was that the appellant failed or refused to retract or to make a satisfactory correction with respect to the impugned report. We are of the view that whether such a failure or refusal would render a defendant liable to aggravated damages would certainly depend on the particular facts and circumstances of a given case. We are supported in this by the decision of the High Court of Australia in *Carson v John Fairfax & Sons Ltd* (1993) 113 AL 577. The majority view in that case at p 593 reads:
- G**
- H** ... we have difficulty in understanding how the mere absence of an apology can aggravate damages. Whereas publication of an apology may mitigate damage, thereby reducing the harm suffered by a plaintiff in a defamation case, and so reduce the damages awarded, the failure to publish an apology does not increase the plaintiffs hurt or widen the area of publication. No doubt want of apology may be a relevant factor in establishing that a defendant is motivated by a desire to injure the plaintiff but that does not mean that want of apology itself aggravates the plaintiffs injury.
- I**

Similarly in the present case, we are of the view that want of apology alone could not be said to have aggravated the plaintiffs' injury. We have to consider other relevant facts. The appellant relied wholly on the statutory defence of absolute privilege and in the circumstances the appellants' counsel contends an apology or retraction would not be appropriate. Further, he contends there is no evidence before the court to show that the appellants' conduct was motivated by malice. Having considered the matter we agree with the contention of counsel for the appellants that in the circumstances of this case an award of aggravated damages is wholly unwarranted and we, therefore, set aside the award of aggravated damages.

### *Conclusion*

In the result we dismissed the appellants' appeal on liability but allowed their appeal on quantum. The award of RM300,000 as general damages is hereby set aside and substituted therefore with an award of RM100,000. It is further ordered that the award of aggravated damage of RM50,000 is set aside. It follows therefore that the cross-appeal by the respondent is dismissed except on the question of interest. On the question of interest, the learned judge awarded interest of 8%pa on the judgment sum from the date of judgment. We are of the view that in the light of Federal Court's ruling in *Karpal Singh all Ram Singh v DP Vijandran* [2003] 2 MLJ 385, the award of interest should run from the date of publication of the impugned reports and it is so ordered. As for costs, since the appellants only succeeded in part of the appeal we would, therefore, award half costs of this appeal to the appellants to be taxed. We made no order as to costs on the cross-appeal. Deposit to be refunded to the appellants.

*Order accordingly.*

Reported by Sivapragasam Kumaran

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